IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-0558

JOANNE COTE,
Plaintiff – Appellee,

v.

DERBY INSURANCE AGENCY, INC., an Iowa Corporation and KEVIN DORN, individually,
Defendants – Appellants.

APPEAL FROM THE IOWA DISTRICT COURT OF WOODBURY COUNTY

THE HONORABLE JEFFREY L. POULSON, JUDGE

APPELLANTS' BRIEF AND NOTICE OF ORAL ARGUMENT

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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4. If Iowa Code § 216.6 did not preempt the Appellee's alternative claims of assault and intentional infliction of emotional distress, did the trial court err by not sustaining the Appellants' summary judgment motion because Appellee did not evidence a prima facie claim that an assault occurred within the two years preceding the filing of her claim in the district court.
5. If Iowa Code § 216.6 did not preempt the Appellee's alternative claims of assault and intentional infliction of emotional distress, did the trial court err by not sustaining the Appellants' summary judgment motion

because Appellee did not evidence a prima facie claim that emotional distress was intentionally inflicted on her within the two years preceding the filing of her claim in the district court.

II. ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2)(c) because it presents substantial issues of first impression regarding interpretation of Iowa Code § 216.6(6)(a). Specifically, the trial court ruled that a portion of Iowa Code § 216.6(6)(a) is ambiguous and held that, inasmuch as a corporation cannot have family members, it cannot avail itself to the 'family member' exception.

The importance of this issue cannot be overstated. Many Iowa families operate small businesses using entities such as corporations, partnerships, limited liability companies, or trusts. The trial court's interpretation denies all such owners an opportunity to avail themselves of the family member exclusion under Iowa Code § 216.6(6)(a) unless they convert to sole proprietor ownership. If The Iowa Civil Rights Commission follows the trial court's interpretation, the risk exposure for discriminatory acts potentially increases for small businesses statewide. That would undermine the purposes for which small businesses decide to incorporate, which is to lower personal liability for business activities. As such, this matter should be retained by the Iowa Supreme Court for adjudication.

III. STATEMENT OF THE CASE

This is an interlocutory appeal from a Ruling on Defendants' Motion for Summary Judgment filed March 1, 2016, by the Honorable Jeffrey L. Poulson. [Ruling, p. 1; App. 176].

Plaintiff Joanne Cote ("Cote") filed an original Petition on April 7, 2014, asserting that Defendant Kevin Dorn ("Dorn"), an employee of Defendant Derby Insurance Agency, Inc. ("Agency"), had sexually harassed her while she worked at Agency. [Petition, p. 3; App. 1].[1] In their Answer, Appellants denied the allegations and denied that Cote stated a 216.6(1)(a) claim. [Answer, p. 1, 2; App. 14]. Appellants also asserted under Iowa Code § 216.6(6)(a) that Iowa Code § 216.6(1)(a) did not apply and that neither the court nor the Iowa Civil Rights Commission ("ICRC") had jurisdiction to entertain Cote's claim against them. [Answer, p. 2; App. 15]. Alternatively, Appellants asserted Cote's discrimination claim was untimely, because it was not filed with the ICRC within 300 days of the last discriminatory act Cote complained of. [Answer, p. 2; App. 15].

In response, Cote amended the Petition on May 27, 2014. [Amended Petition, p. 1; App. 20]. She asserted alternatively that Dorn had assaulted her and/or he intentionally inflicted emotional distress on her during that employment.

[1] Cote also joined Derby Insurance Services, Inc. ("Services") as a defendant and alleged it retaliated against her. However, those parties resolved their issues and Cote dismissed Services from the case before the summary judgment motion was filed.

[Amended Petition, p. 5; App. 24]. The Appellants' Amended Answer denied those allegations. [Amended Answer, p. 1, 2; App. 34]. Appellants asserted that Cote's tort claims were outside the two years statute of limitations and were time barred, and that no claim upon which relief can be granted was stated. [Amended Answer, p. 2; App. 35].

These were among the issues that Appellants raised in the summary judgment motion. [Motion for Summary Judgment, p. 1, 2; App. 37, 38]. Also argued was that the alternative tort claims were preempted should Iowa Code § 216.6(1)(a) apply, that Cote failed to adduce evidence of prima facie claims within the periods of limitations in regard to all her claims, and her failure to designate and use expert testimony to support the intentional infliction of emotional distress claim. [Motion for Summary Judgment, p. 1, 2; Brief of Defendants, Brief in Opposition to Plaintiff's Resistance; App. 37-40].

The trial court overruled the summary judgment motion with the exception that it barred Cote's common law tort claims to the extent that they were based on acts that occurred prior to the two-year limitation period in Iowa Code § 614.1(2). [Ruling, p. 21, App. 196]. The trial court determined it had jurisdiction over Appellants under Iowa Code § 216.6(1)(a) because there were five regular employees working at Agency when Cote claimed she experienced sexual harassment. [Ruling, p. 11; App. 186]. It rejected the Appellants' claim to the

'family member' exception, ruling that Iowa Code § 216.6(6)(a) just applies to unincorporated employers. [Ruling, p. 7-10; App.182-185]. The trial court also allowed that Cote had stated a prima facie claim of sexual harassment claim. [Ruling, p. 11-16; App. 186-191].

The trial court did not determine that Iowa Code § 216.6 preempted the Plaintiff's alternative claims of assault and intentional infliction of emotional distress. Moreover, in deciding against Appellants on their motion, the court found sufficient proof of prima facie claims of both torts had been adduced by Cote. [Ruling, p. 16-19; App. 191-194]. The district court also ruled that, under the existing circumstances, no expert testimony was needed to support the intentional infliction of emotional distress claim. [Ruling, p. 20; App. 195].

IV. STATEMENTS OF FACT

a. *Agency's corporate status*. Agency was incorporated in Iowa on January 8, 1991, and its sole owner, Patricia Dorn, elected sub-S status for the entity. [Defendants' Statement of Undisputed Material Facts (hereafter "DSUMF") ¶¶ 2, 3; P. Dorn Affidavit, ¶¶2, 3; App. 54, 59]. Agency conducted an insurance agency in Sioux City, Iowa until October 10, 2012, when it sold the assets, insurance book of business and goodwill to Derby Insurance Services, Inc. ("Services") and ceased its Iowa operation. [DSUMF, ¶4, 5; Dorn Affidavit, ¶4; App.54, 59].

b. *Agency's employees.* Kevin and Patricia Dorn were married on July 26, 2000. [DSUMF, ¶3; Dorn Affidavit, ¶2; App. 54, 59]. Since that time they have lived together in their home. [DSUMF, ¶3; Dorn Affidavit, ¶2; App. 54, 59]. Both work for Agency as full-time sales employees. [DSUMF, ¶7; Dorn Affidavit, ¶7; App. 54, 59]. Patricia Dorn's niece, Patricia Strawn, worked in sales as a full-time employee, too. [DSUMF, ¶7; Dorn Affidavit, ¶9; App. 55, 60]. In addition, in the two years preceding its sale of assets to Services, Scott Delperdang worked in sales as a full-time employee until February of 2012. [DSUMF, ¶7; Dorn Affidavit, ¶8; App. 55, 60]. After he ceased to work for Agency, Candice Hunter replaced him in March of 2012 as a full-time employee in sales. [DSUMF, ¶7; Dorn Affidavit, ¶8; App. 55, 60]. Agency also employed Cote as the full-time office manager. [DSUMF, ¶6; Dorn Affidavit, ¶8; App. 54, 60].

Patricia Dorn's grandniece, Jasmine Derby, was employed temporarily in the summer of 2012 to do filing at $10 per hour. [DSUMF, ¶8; Dorn Affidavit, ¶10; Strawn Affidavit, ¶17; App. 55, 60, 80]. Agency did not typically employ an individual to do filing, nor did Agency have a consistent position with a part time status doing similar duties. [DSUMF, ¶9; Dorn Affidavit, ¶7; Strawn Affidavit, ¶17; App. 55, 60, 80]. As a part-time office helper, Ms. Derby did not have set hours of work. [Dorn Affidavit, ex. B; App. 71, 72]. Ms. Derby received a total of

$942.52, inclusive of out-of-pocket reimbursements, for those 8 weeks. [DSUMF, ¶9; Dorn Affidavit, ¶10; App. 55, 60].

After Agency's sale of the assets to Services on October 10, 2012, Cote and Ms. Strawn started working for Services. [DSUMF, ¶12; Strawn Affidavit, ¶4, 5; App. 56, 78-79].

c. *Agency's office layout.* Although she was the office manager, Cote sat behind the reception desk in the Agency office. [DSUMF, ¶18; Strawn Affidavit, ¶9; App. 56-57, 79]. A busy area throughout the work day, it was the location of various office machines, such as the postage meter and a machine that copied, faxed and scanned paper. In that same area were office storage and filing cabinets. [DSUMF, ¶18; Strawn Affidavit, ¶9; App. 56-57, 79]. The sales people, including Dorn, were in that area dozens of times a day, during the morning and the afternoon, for a variety of reasons, such as to obtain customer files, apply postage on outgoing mail, make copies, send a fax, get supplies, or take a customer payment. [DSUMF, ¶18; Strawn Affidavit, ¶¶9, 10; 56-57, 79].

Next to the reception counter where Cote sat was a large window to the outside. Immediately adjacent to that counter was the front door. Persons entered the office daily throughout business hours. Across from the reception area is where clients sat, filling out forms, waiting for agents. It was highly visible, and a well-used space. [DSUMF, ¶19; Strawn Affidavit, ¶9; App. 57, 79].

d. *Cote's discrimination complaint.* At no time in her years of employment at Agency did Cote complain of sexual harassment or of employment discrimination of any kind. [DSUMF, ¶13; Dorn Affidavit, ¶11; Strawn Affidavit, ¶¶8, 13, 14; App. 56, 60, 79-80]. While working at Services early in February of 2013, though, Cote voiced that she thought Dorn was a creep because, she said, while he worked at Agency, there were times Dorn had walked around the office with his pants unzipped. [DSUMF, ¶15; Strawn Affidavit, ¶5; App. 56, 78-79]. At a subsequent meeting that Cote had with Strawn and Tad Edeal, one of the owners of Services, she stated that Dorn had acted improperly at Agency on various occasions since 2005, although not after March in 2012. [DSUMF, ¶17; Strawn Affidavit, ¶7; App. 56, 79]. Cote gave a typed memo she composed to Edeal, too. [DSUMF, ¶16; Strawn Affidavit, ¶8; App. 56, 79]. It mentioned instances of Dorn's alleged behaviors during years they were working at Agency and the last is alleged to have happened in March of 2012. [DSUMF, ¶17; Strawn Affidavit, ¶8, Edeal Affidavit, ¶¶7, 9 and ex. A; 56, 79, 74-77].

During her interview with the ICRC before her charge was filed, however, Cote produced a new typed memo, wherein she had added several paragraphs at the end. [Cote Affidavit, ¶23, and ex. A-1, pp. 5-7; App. 109, 115-117]. There Cote said that during June and July of 2012 she perceived she was being harassed by Dorn because he was 'around' the area where she sat and sometimes, she said,

he asked her something, and at other times not. [Cote Affidavit, ¶21, and ex. A, pp. 6; App. 108-09, 116]. But the memo also proclaimed she did not see Dorn doing anything because she did not look at him. [Cote Affidavit, ¶21, and ex. A, pp. 6; App. 108-09, 116].

Cote's claim of sexual harassment was filed with the ICRC on April 10, 2013. [Cote Affidavit, ex. A-1, p. 1-4; App. 111-114]. Cote's original Petition was filed in the district court on April 7, 2014. [Petition, p. 1; App. 1].

V. LEGAL ANALYSIS

This Honorable Court must reverse the trial court's ruling that the family-member exception in Iowa Code § 216.6(6)(a) does not apply to corporate employers because they cannot have families. The interpretation is inconsistent with how the law defines employers, and its logic does not comport with the other subsections of Iowa Code § 216.6(6). The ruling does not recognize that statutory exclusion in Iowa Code § 216.6(6)(a) is intended to benefit the people associated with the business, whether or not the owner choses a corporate framework. The Iowa Legislature wanted to protect not simply sole proprietors but all small, family-owned businesses. The trial court failed to grant summary judgment to Appellants because of its erroneous interpretation of Iowa Code § 216.6(6)(a).

However, if the trial court interpreted the statute correctly, it should have ruled that Iowa Code § 216.6 preempted Cote's alternative claims of assault and

intentional infliction of emotional distress. The discriminatory acts Cote alleged are elements of those alternative claims, requiring Cote to prove discrimination to be successful in presenting them. Thus, the trial court erred in denying summary judgment to Appellants on that basis.

A summary judgment on Appellants' motion was required, too, because Cote did not adduce prima facie proof of sexual harassment, assault, and intentional infliction of emotional distress in the critical months of June and July of 2012. The trial court erroneously relied on evidence of acts that occurred *prior* to the 300-day period of limitations under Iowa Code § 216.15(13). [Ruling, p. 14, 15; App. 189-90]. It also relied erroneously on incidents that Cote said had happened prior to the two-year limitations under Iowa Code § 614.1(2) as proof of the tort claims being asserted. [Ruling, p. 19; App. 194].

How the Issues were preserved for Appeal

The Appellants filed an application for interlocutory appeal of the trial court's March 1, 2016, Ruling on Defendants' Motion for Summary Judgment. See Iowa R. App. P. 6.104. The application was granted by the Iowa Supreme Court. [Order Granting Application for Interlocutory Appeal; App. 198-200].

Standard of Review on Appeal

When an appeal involves questions of statutory interpretation, the scope of review is for correction of errors at law. *State v. Romer*, 832 N.W.2d 169, 174 (Iowa 2013). See *In re Det. Of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010).

Further, on a review of a district court's ruling on a motion for summary judgment, an appellate court reviews that decision for correction of errors at law. Iowa R. App. P. 6.907. The appeals court views the record in a light most favorable to the nonmoving party. Each reasonable inference that can be drawn from the record is accorded to that party. *Estate of Grey v. Baldi*, 2016 Iowa Sup. LEXIS 57 (Iowa 2016). However, an inference must not be based on speculation or conjecture. *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 287 (Iowa 2000).

Summary Judgment standard

Iowa permits a district court to grant summary judgment to a movant when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *SHI R2 Sols., Inc. v. Pella Corp.*, 864 N.W.2d 553 (Iowa Ct. App. 2015). The trial court's task is to review the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine whether there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3). A question of fact exists "if reasonable minds can differ on how the issue

should be resolved." *Walker v. Gribble*, 689 N.W.2d 104, 108 (Iowa 2004). However, to survive a motion for summary judgment, sufficient facts must be in the record to support the claim so that a reasonable fact finder could find in the nonmoving party's favor. *McQuistion v. City of Clinton*, 872 N.W.2d 817, 822 (Iowa 2015).

1. ***The trial court erred by misinterpreting Iowa Code § 216.6(6)(a) and not dismissing Cote's claim under Iowa Code § 216.6(1)(a).***

Neither the ICRC nor the trial court should have entertained Cote's claim of discrimination because Iowa Code § 216.6(1)(a) did not apply to Appellants. Specifically, Iowa Code § 216.6(6) reads:

> 6. This section shall not apply to:
> *a.* Any employer who regularly employs less than four individuals. For purposes of this subsection, individuals who are members of the employer's family shall not be counted as employees.
> *b.* The employment of individuals for work within the home of the employer if the employer or members of the employer's family reside therein during such employment.
> *c.* The employment of individuals to render personal service to the person of the employer or members of the employer's family.

So the salient question, which is how many individuals does the employer 'regularly' employ, must be answered with reference to 'members of the employer's family' that are to be excluded from the count. And in that regard, Appellants contended to the trial court that owner Patricia Dorn, her husband Kevin Dorn, her niece Patricia Strawn, and her grandniece, Jasmine Derby, should

not be counted as they are members of the employer's family. But the trial court avoided that contention because, it ruled, the exclusion of family members is not available to corporate employers.

a. The trial court erroneously interpreted Iowa Code § 216.6(6)(a) and denied its availability to a corporate employer.

The trial court began its analysis by deciding that Iowa Code § 216.6(6)(a) was ambiguous because the phrase "members of the employer's family" was not defined. [Ruling, p. 7; App. 182]. The trial court was not persuaded that the legislature's definitions of "employer" in section 216.2(7) as including every "person employing employees within the state," and "person" in section 216.2(12) as inclusive of "one or more . . . corporations . . ." had settled the question. Instead, the trial court reasoned, because "a corporation is an artificial entity that cannot have family members," [Ruling, p. 7, 8; App. 182-83], it would construe the phrase "members of the employer's family" as only being applicable to employers that are 'individuals' and, as a result, Agency was denied the exception. [Ruling, p. 8-10; App. 183-85].

Of course, had the legislature intended that result, 'individual' could have been used as a modifier within that phrase. It would have been easy to have written 'members of an individual employer's family' if the limitation the trial court applied was on the legislators' collective minds. But inasmuch as drafters

had used the word "individual" at least once in every subpart of Iowa Code § 216.6(6), the omission of 'individual' where the trial court wanted to place the word should be seen as deliberate on the legislature's part.

In supporting its reading of the statute, the trial court read Iowa Code § 216.6(6)(a) as creating two categories. Corporations, it said, are availed of the less-than-four-employee exception; however, corporations are not afforded the family member exception - the' "exception to the exception" ' to use its words. [Ruling, p. 10; App. 185]. Clearly, the trial court strained to find a means of harmonizing the associational interests of small but incorporated employers, while still keeping jurisdiction over Cote's discrimination case. There is no support anywhere in section 216 for such an interpretation, though. The trial court should have been guided by "what the legislature actually said, rather than what it could or should have said." *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999). If the Iowa Legislature thought that Iowa Code § 216.6(6) should just apply to sole proprietors, it is logical to think it would have used that phrase in establishing the 'family member' exclusion.

Even the ICRC, which kept jurisdiction over Cote's case, clearly understood that the family member exception applied to entities as well as individuals. [Cote Affidavit, ex. D; App. 162-64].

The fallacy in the trial court's analysis becomes clearer as one examines subpart (b) of Iowa Code § 216.6(6), as there is no "exception to the exception" to distinguish a category for employers that are entities from a category for employers that are individuals. Subpart (b) exempts the employment of individuals for work within the home of the employer. Following the trial court's analysis, subpart (b) would only apply to an 'employer' that is an 'individual' inasmuch as entities such as partnerships, associations, corporations do not have homes, just as they do not have family members. Absent from Iowa Code § 216.6, however, is any indication that section 216.6(6)(b) was just meant to apply to individuals who are employers.

Just the same, subpart (c) of Iowa Code § 216.6(6) demonstrated the drafters' intent that 'the employer's family' be inclusive of all employers. Subpart (c) exempts the employment of individuals to render personal service. In the phrase "to the person of the employer or members of the employer's family" the generic antecedent "person" is used. Logically, it refers to owners of businesses, whether they are individuals, shareholders, partners, or associates. The drafters' use of the phrase "person of the employer" in subpart (c) would be awkward and clumsy if, in fact, the legislature intended subpart (c) to be limited just to employers that are individuals, as the trial court ruled that 'employer's family' must be read.

In the absence of legislative history, one must presume the legislature knew the terminology that it used in writing the statutory definitions. Further, if in drafting section 216.6(6), had it been the legislature's intention not to allow the benefits of its various subparts to be claimed by entities such as partnerships, associations, and corporations, it would be logical for the Iowa Legislature to have written that injunction plainly. After all, small business owners began using corporate and partnership forms well before the discrimination laws were written. Section 216.2(12) showed the legislature understood that people operated businesses under a variety of legal mechanisms. Substantial discussion would have ensued at the time and, likely, some objection would have been voiced, had the legislature indicated that 'employer's family' under any of the subparts was just limited to sole proprietors. No inkling of a Hobson's choice, that operating through a corporation or other entity meant the owner and members of the owner's family would be counted under subpart (a) or would forego the exceptions of (b) and (c), is found in any of the statutes, cases or commentary regarding Iowa Code § 216.6(6), at least until the trial court made its ruling.

The court observed in *Baker v. City of Iowa City*, 750 N.W.2d 93, 103 Fair Empl. Prac. Cas. (BNA) 951 (Iowa 2008) that the Legislature made a policy decision in enacting ICA § 216.6, which was that "freedom of association should preponderate over concepts of equal opportunity" in situations involving small

employers." 750 N.W.2d at 101. The underlying rationale was protecting the 'intimate and personal relations' small businesses have with their employees, quoting from Arthur Bonfield's article, *State Civil Rights Statutes: Some Proposals*, 49 Iowa L. Rev. 1067 (1964). Id. That free association he mentioned does not have corporate limits.

A court cannot be "somewhat consistent" in applying a legislative imperative. [Ruling, p. 9; App. 184]. In protecting associations among an employer's family when the owner is a sole proprietor, but leaving similarly situated people to the devices of Iowa Code § 216.6(1)(a), the trial court, unlike King Solomon, split the baby. The result is disparate treatment of similarly situated Iowa citizens. That offends notions of equal protection of law, which Agency and its employee Dorn will be denied if the trial court's ruling is allowed to stand.

Courts must construe a statute to effectuate the Legislature's purpose. Following the dictate of ICA § 216.18(1), a broad construction of Iowa Code § 216.6(6)(a) is mandated, rather than a constrained reading or restrictive interpretation to enable a court to entertain jurisdiction where it may be lacking. *Anderson v. State*, 872 N.W.2d 410, (Iowa Ct. App. 2015).

Further, the position Cote advanced to the trial court, i.e. that corporations are fictitious entities, and the owner's conscious decision to seek that shield

stripped away other rights an individual doing business has, does not comport with jurisprudence that recognizes the rights people have are not lost because they choose to do business through an entity. For instance, the United States Supreme Court, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675, 123 Fair Empl. Prac. Cas. (BNA) 621 (2014), found that 'persons' as used in the Religious Freedom Restoration Act of 1993 (RFRA) included corporations. It allowed that entities closely held can espouse the religious beliefs of their owners and, thus, be considered as exempt 'employers' under the Patient Protection and Affordable Care Act of 2010 as against the assertion that corporations, being fictitious entities and not people, cannot hold a religious belief. The opinion said that the RFRA's definition of "persons" was broad and inclusive of corporations. It observed a legislative imperative, when including corporations, was that:

> Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: *It included corporations within RFRA's definition of "persons."* But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like

> Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

134 S. Ct. at 2768, 189 L. Ed. 2d at 695-696 (emphasis added). The court held that such persons do not forgo their statutory and constitutional rights by choosing to incorporate their small businesses.

Appellants are not unmindful of law that speaks to a business 'bearing the burdens when it accepts the advantages' of incorporation. See, e.g. *Hawkeye Bank & Tr., Nat'l Ass'n v. Baugh*, 463 N.W.2d 22, 25 (Iowa 1990). But the rationale for *Hawkeye's* not permitting a non-attorney shareholder to represent a corporation, grounded in a rule laid down by Chief Justice Marshall in 1824 that a corporation can appear in court only by an attorney, see 463 N.W.2d at 23, is different from what is present here, due largely to the specific and directive nature of the statutory scheme. Iowa Code § 216.2(7) says that employer means every "person . . . employing employees" within the state, and Iowa Code § 216.2(12) says "person" means "individuals, partnerships, associations, corporations . . .," and Iowa Code § 216.6(6)(a) directs that "members of the employer's family" shall not be counted as employees. Appellants contend this scheme and the family member exception embedded in Iowa Code § 216.6(6)(a), was not meant to be stripped away unknowingly and, certainly, not by an owner's otherwise logical decision to do business as something other than a sole proprietor.

b. Consonant with ICA § 216.18(1) the Appellate Court should interpret 'members of the employer's family' broadly to effectuate the purposes behind the exception that the Legislature gave small employers in section 216.6(6)(a).

The ambiguity within section 216.6(6) over who are 'members of the employer's family' is the issue that the trial court sidestepped in fashioning a decision. [Ruling, p. 10; App. 185]. That issue has two components. The first asks whose family should be considered. The other asks which members of the family must be counted.

Appellants maintain that as the term 'employer's family' is used, the legislature intended it to apply to business' owners, and not the businesses' board members or other affiliated persons. Cf *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999) (legislature's use of the words "person" and "employer" indicates a clear intent to hold a "person" subject to liability separately and apart from the liability imposed on an "employer."). So in answering the first inquiry, it is simply an owner's family that should be considered. For purposes of this case, a fact not disputed by Appellee is that Patricia Dorn is the sole owner of Agency. Thus, it is individuals who are members of Patricia Dorn's family that are not to be counted as employees.

It was mentioned in *Vivian* that "[t]here is surprisingly little to discover with regard to the legislative history of the Iowa Civil Rights Act." 601 N.W.2d at 874.

That paucity lends one to look elsewhere for guidance. In attempting to discern the individuals who are members of Patricia Dorn's family that shall not be counted as employees, courts tend to look to dictionary definitions to ascertain the ordinary meaning of words. Most dictionaries define 'family' as a biological relationship or a legally recognized relationship such as by adoption or marriage. It is reasonable from the context used to believe this ordinary and common meaning also was intended by the Iowa Legislature. See *City of Fairfield v. Harper Drilling Co.*, 692 N.W.2d 681, 684 (Iowa 2005) (words not defined in a statute are given their ordinary and common meaning by considering the context in which the words were used).

The next component is how far the 'family' relation should extend, for purposes of subtracting family members from the count. Is 'family' limited to a husband and wife? Does 'family' include the owner's (i) children, (ii) parents, (iii) grandparents, or (iv) grandchildren? Should the owner's 'family' extended, including aunts, uncles, cousins, nieces and nephews, be excluded?

Throughout Iowa and nationwide, employing 'family' is a well-recognized way of conducting business. Not infrequently, small businesses are passed down through the 'family' line. Family farms are just one example. Other examples, such as a local hardware store, abound. Trust, reliability, and even tax advantage

encourages small business owners to use not just a spouse, child, or parent but, as well, extended family members to contribute to making the enterprise a success.

How other statutes use words and phrases can help to clarify Iowa's law, too. The language of the Iowa Code is strikingly similar to some Internal Revenue Code sections. For instance, in determining a qualified heir of real property, IRC § 2032A(e)(2) defined a member of the decedent's family this way:

> (2) Member of family. The term "member of the family" means, with respect to any individual, only:
> - (A) an ancestor of such individual,
> - (B) the spouse of such individual,
> - (C) a lineal descendant of such individual, of such individual's spouse, or of a parent of such individual, or
> - (D) the spouse of any lineal descendant described in subparagraph (C).For purposes of the preceding sentence, a legally adopted child of an individual shall be treated as the child of such individual by blood.

The IRS promulgated IRC § 447 to provide methods of accounting for corporations engaged in farming. An exception for 'family' corporations is found at subpart (d)(2)(C), in defining who are members of the same family, for purposes of subsection (d), the law provided at subpart (e)(1) of § 447 that:

> (1)the members of the same family are an individual, such individual's brothers and sisters, the brothers and sisters of such individual's parents and grandparents, the ancestors and lineal descendants of any of the foregoing, a spouse of any of the foregoing, and the estate of any of the foregoing,
>
> . . . .

> For purposes of paragraph (1), individuals related by the half blood or by legal adoption shall be treated as if they were related by the whole blood.

These examples give an expansive definition for determining who "members of the employer's family" are. However, of note, in-laws may be outside the IRS 'family' purview. In *Estate of Cowser v. Commissioner*, 736 F.2d 1168, 84-2 U.S. Tax Cas. (CCH) P13,579, 54 A.F.T.R.2d (RIA) 6474, 54 A.F.T.R.2d (RIA) 148748 (7th Cir. 1984) the appeals court observed that had executrix Patricia Tucker, seeking to be a qualified heir, been the grandniece of the decedent, she would be a qualified heir, but as the grandniece of the decedent's wife, she was not a qualified heir. 736 F.2d at 1171.

A common place understanding of who members of an employer's 'family' are leans, in Appellants' view, toward the lineal family definitions used by the Internal Revenue Service. But the ICRC took a different tack when it examined who in the Dorn family are not counted for purposes of section 216.6(6)(a). It limited its consideration to members of the employer's household, e.g. parents, spouse and children. [Cote Affidavit, ex. D; App. 164]. But that construction has no basis in section 216.6(6)(a) and, in fact, seems contra-indicated by language the Legislature used in subpart (b) of section 216.6(6). There, the drafters actually wrote "within the home of the employer" and bespoke of "members of the employer's family [who] reside therein during such employment." That same

terminology could have been written into section 216.6(6)(a), if the intent was that only people living in the owner's home would be excluded from the count. The use of the language in subpart (b) but not in subpart (a) is evidence of a legislative intent not to treat the exclusion of members of the employer's family as limited.

The comings and goings of family from the owner's household also makes the target unmanageable, and could lead to arbitrary and capricious results. A son living with his parents who own the enterprise would be excluded, but if he moved to an apartment of his own but continued to work in the business, he would be outside the 'household' and included in the count.

The best and, perhaps, the most logical interpretation, therefore, would allow the owner's lineal ascendants and descendants, and collateral descendants, to be family members who are excluded from the count. In that interpretation, the sole shareholder (Patricia Dorn), the owner's husband (Kevin Dorn), the owner's niece (Patricia Strawn), and the owner's grandniece (Jasmine Derby), are 'family members' for purposes of applying the exception.

c. *Employing Jasmine Derby during the summer months in 2012 did not make her a 'regular' employee for purposes of applying Iowa Code § 216.6(6)(a).*

In exempting those small businesses that employ less than four individuals from the ambit of the discrimination statute, Iowa Code § 216.6(6)(a) created a second caveat, which is that an employer must "regularly" employ the individuals

being counted. The trial court addressed in a footnote some thoughts about the phrase "regularly" employs but did not provide an analysis, based on the facts, because it decided that Agency regularly employed five individuals, not considering the owner's grandniece, Jasmine Derby. [Ruling, p. 11, fn. 3; App. 186].

The question raised here is moot should this court's decision be that the trial court's interpretation of Iowa Code § 216.6(6)(a) was correct. It also is moot if this court interprets 'members of the employer's family' as being inclusive of the owner, her spouse, her niece, and her grandniece. By not counting them among the individuals Agency regularly employs, Agency regularly employed fewer than four individuals in the two years preceding October of 2012, which was when Agency's assets were sold and it ceased operations in Iowa. However, should the court's decision fall between these opposites, such that just the owner and her spouse, but not the owner's niece and grandniece, be the individuals not counted, the number of individuals Agency 'regularly employs' is a deciding factor.

During the two years preceding its sale of assets to Services, Agency regularly employed Scott Delperdang in a sales position until February of 2012. Then, Candice Hunter replaced him in March of 2012 Hunter worked at Agency until it ceased its Iowa operations. [DSUMF, ¶¶7, 11; Dorn Affidavit, ¶8; App. 55, 56, 60]. Together, they constituted one 'regularly employed individual. In

addition, Agency regularly employed Strawn in a sales position throughout this two year period. [DSUMF, ¶¶7, 12; Dorn Affidavit, ¶9, Strawn affidavit, ¶4; App. 55, 56, 60, 78]. And, also, Cote worked regularly for Agency as the office manager during those two years. [DSUMF, ¶¶7, 8; Dorn Affidavit, ¶8; App. 55, 60]. At any point within that two year period, Agency regularly employed three individuals, not counting the owner and her spouse. [DSUMF, ¶¶7, 11; Dorn Affidavit, ex. A; 55, 56, 62].

A fourth individual, Jasmine Derby, also worked at Agency during parts of summer in 2012. [DSUMF, ¶¶7, 9; Dorn Affidavit, ¶9, 10; App. 55, 60]. If Agency did not 'regularly employ' an individual doing the work Ms. Derby performed, then Agency regularly employed fewer than four individuals, and Iowa Code § 216.6(1) did not apply. Thus, the job Agency hired Ms. Derby to perform must be considered.

Based on the evidence, Agency did not regularly employ an individual to help with filing duties, whether full-time or part-time. As it pertained to Ms. Derby, a relative being given her first paying job, she was a temporary hire. [DSUMF, ¶¶7, 9, Dorn Affidavit, ¶10 and ex. A; App. 55, 60, 62]. Her task was office filing primarily. [DSUMF, ¶9, Strawn Affidavit, ¶17; App. 55, 80]. She worked without set days or work hours. [DSUMF, ¶¶7, 9, Dorn Affidavit, and ex. B; App. 55, 71-72]. During an 8 week period, Ms. Derby never worked more than

15 hours in any particular week and, in some weeks, as few as nine or three hours. [Dorn Affidavit, ex. B; App. 71-72]. Ms. Derby was paid $10 per hour. [DSUMF, ¶9, Dorn Affidavit, ¶10, and ex. B; App. 55, 60, 71-72]. She received a total of $942.52 in wages and of out-of-pocket reimbursements during that summer. [DSUMF, ¶9, Dorn Affidavit, ¶10, and ex. B; App. 55, 60, 71-72].

On that evidence, Appellants contended that Ms. Derby cannot be considered an individual that Agency regularly employed. Of note, Iowa has no specific case addressing what 'regularly employs' means under Iowa Code § 216.6(6)(a). However, the federal district court in *Cochran v. Seniors Only Fin., Inc.*, 209 F.Supp.2d 963 (S.D. Iowa) borrowed from Title VII to interpret the state statute. That federal statute defined an "employer" as a person "who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." See 42 U.S.C. § 2000e(b). *Cochran* adopted that definition in interpreting Iowa Code § 216.6(6)(a). Inasmuch as Iowa courts traditionally turn to federal law for guidance in evaluating Iowa code chapter 216, see, e.g. *King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 598, 601 (Iowa 1993), *Cochran's* approach was logical and consistent with Iowa law. And judged by that standard, Ms. Derby is not someone Agency regularly employed, as she did not work for each working day in 20 calendar weeks.

However, the trial court found fault with *Cochran,* saying its author had "no logical basis for that construction." [Ruling, p. 11, fn. 3; App. 186]. The trial judge criticized the Title VII standard as being "formulaic" and, despite admonitions such as is stated in *King*, said he would refuse to apply it in the case. [Ruling, p. 11, fn. 3; App. 186]. But nowhere in the ruling did the trial court consider Ms. Derby's situation factually. Thus, it is uncertain whether in the trial court's view of the evidence she was an individual Agency regularly employs, using a "more variable" interpretation as the trial court believed was proper.

If the Title VII standard is rejected, though, then a meaning established in case law should be examined. In *Annett Holdings, Inc. v. Allen*, 738 N.W.2d 647 (Iowa Ct. App. 2007) an issue presented was whether or not an individual 'regularly" worked in Iowa for workers' compensation purposes. In approving the determination, the court said it was appropriate for the commissioner to decide if it was "usual or customary for the employee to work in the state for the employer" because "regularly" meant "conforming to a fixed procedure, usual or customary." 738 N.W.2d at 650.

Applying the same standard to the facts of this case, Ms. Derby cannot be thought of as an individual Agency regularly employed. Except for Cote, who was the office manager, the individuals regularly employed at Agency were engaged in sales. It was not usual or customary for Agency to employ a filing clerk.

[DSUMF, ¶8, Strawn Affidavit, ¶17; App. 55, 80]. Rather, to allow her to earn spending money during the summer, Patricia Dorn gave Ms. Derby her first job. [DSUMF, ¶9, Strawn Affidavit, ¶17; App. 55, 80]. And in the weeks between June and August when she worked, it was not according to a regular schedule, or a fixed procedure. The records show the most she worked in any week was 15 hours and as few as four hours. [Dorn Affidavit, ex. B; App. 71-72]. Thus, Ms. Derby's situation at Agency is best described as temporary help. She should not be an individual a court considers in determining the number of individuals Agency regularly employed in those months.

2. The trial court erred in failing to determine that Iowa Code § 216.6 preempted Cote's alternative claims of assault and intentional infliction of emotional distress.

Since the trial court ruled that Iowa Code § 216.6(1)(a) applied, consistent with that law, it should have dismissed Cote's alternative claims of intentional infliction of emotional distress and assault. Based on the summary judgment evidence, neither tort is 'separate and independent' of the ICA § 216 claim asserted here. That is to say, the discriminatory acts alleged also are elements of Cote's alternative claims. Alternative claims are preempted when a plaintiff must prove discrimination to be successful in them. *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 38, 62 Fair Empl. Prac. Cas. (BNA) 484, 8 I.E.R. Cas. (BNA) 1150, 61 Empl. Prac. Dec. (CCH) P42,281 (Iowa 1993). See *Channon v. UPS*, 629 N.W.2d 835,

858 (Iowa 2001). So consistent with its ruling permitting the discrimination claim to be tried, the trial court should have dismissed the alternative claims.

The facts in *Greenland*, a seminal case on the preemption doctrine, were that the employee alleged verbal harassment consisting of "graphic descriptions of fantasized sexual conduct" and false rumors of a "meretricious association" as well as six instances of inappropriate touching. Id. at 37. In reviewing the trial court's ruling, the Iowa Supreme Court said her claim of intentional infliction of emotional distress was preempted because the outrageous acts she grounded that tort on also constituted the harassing conduct of the discrimination claim. On the other hand, the assault and battery claims were not preempted because they were complete without reference to discrimination. Id.

In this case, Cote amended her petition to allege claims of intentional infliction of emotional distress and assault. [Amended Petition, p. 5; App. 24]. In deciding that these claims related back to April 7, 2014, the date of her original Petition, rather than the date Cote moved to amend, the trial court ruled these claims were "based on the same alleged acts." [Ruling, p. 18; App. 193]. The trial court established, thus, that the operative facts of these claims were the same as in Cote's claim under the ICRA.

Further, in examining the amended pleading, no new facts were advanced to support the alternative claims. And, in the factual record, the only conduct Dorn is

accused of in the three-hundred day period preceding Cote's filing with the ICRC on June 15, 2012, and in the two years preceding her filing the original Petition on April 7, 2014, was his 'wandering' in Cote's work area during June and July of 2012. [Cote Affidavit, ¶21, and ex. A-1, 6; App. 108, 116-17]. And at these times, Cote just imagined he was 'displaying' himself. [Cote Affidavit, ex. A-1, 6; App. 116]. Cote never saw Dorn exposing himself, though; by her own admission she never looked at him. [Cote Affidavit, ¶21, and ex. A-1, 6; App. 108, 116].

Just like *Greenland*, the operative facts giving rise to Cote's claim of harassment on the one hand, and the inflicting of emotional distress or assault on the other hand, were the same, i.e. Dorn's wandering in Cote's vicinity during June and July of 2012. Cote's allegations of tortious conduct are indistinguishable from her harassment allegations. But unlike *Greenland*, where touching the employee's person was evidenced, Dorn neither touched Cote nor did he commit some other act designed to put Cote in fear of physical contact.

If the ICRC claim is valid, as the trial court ruled, then it was error for the trial court not to have granted Appellants' motion for summary judgment on the basis of preemption and dismissed the alternative claims.

3. The trial court erred in failing to dismiss each of the Plaintiff's claims as not stating a claim or as time barred under the appropriate statutes of limitation.

a. *The Iowa Civil Rights Act claim.*

Cote alleged that there were instances between 2007 and March of 2012 when she saw Dorn in the office with his pants unzipped, or when his penis seemed erect. [Cote Affidavit, ex. A-1, 5-6; App. 115-16]. Whether or not truthful, at summary judgment these remained just assertions, all of which are beyond the period of limitations. While Cote worked at Agency she never complained about such alleged incidents, i.e. not to the owner [Dorn Affidavit, ¶11; App. 60], not to her co-worker [Strawn Affidavit, ¶13; 80], and not to the ICRC until April 10, 2013 [Cote Affidavit, ex. A-1, p.4; App. 114]. After she ceased working at Agency in October of 2012, no complaint was voiced until February of 2013, while Cote was working at Services. She first alleged to Patty Strawn and, later in the day to Strawn and their boss, Tad Edeal, any inappropriate conduct by Dorn in prior years when they were co-workers at Agency. [Strawn Affidavit, ¶5, Edeal Affidavit, ¶¶5-8; App. 78-79, 74-75].

At the meeting Cote gave to Edeal a two page memo containing accusations against Dorn. [Edeal Affidavit, ¶¶7-9, Strawn Affidavit, ¶8; App. 74-75, 79]. The last incident Cote recorded in that memo was one from March 12, 2012 and, when Edeal asked Cote if this was all that had occurred, Cote replied that it was. [Edeal Affidavit, ¶¶7, 9, and ex. A; 74-75, 77]. However, when Cote went to the ICRC she produced a memo with some additional paragraphs added at the end, to say there were instances in June and July of 2012 when Dorn "came wandering around

my work area . . . ." [Cote Affidavit, ex A-1, p. 6; App. 116]. However, in that statement, and in her summary judgment affidavit, Cote admits she did not look at Dorn. [Cote Affidavit, ¶21, and ex A-1, p. 6; App. 108, 116].

In order to present a claim for a hostile work environment Cote must show, *inter alia*, evidence of that she was subjected to unwelcome sexual harassment. *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 748 (Iowa 2006). The time bar for claims under the Iowa Civil Rights Act of 1965 is found at Iowa Code § 216.15(13). It provides a claim cannot be maintained unless a complaint is filed within three hundred days after the alleged discriminatory act or unfair practice occurred. Cote filed her claim with the ICRC on April 10, 2013. [Cote Affidavit, ex. A-1, p.4; App. 111-14]. The trial court recognized that alleged events before June 15, 2012, are time barred, at least as discrete acts of discrimination. [Ruling, p. 13; App. 188]. Nevertheless, the trial court allowed that acts of sexual harassment before the 300-day limitation period might be considered if other acts of harassment occurred within 300 days of the ICRC filing date. [Ruling, p. 12; App. 187]. This is consistent with *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n,* 672 N.W.2d 733, 741 (Iowa 2003), which holds that "an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability," citing *AMTRAK v. Morgan*, 536 U.S. 101, 117 (2002).

Thus, for this harassment claim, which really was the only claim Cote attempted to present evidence in support of, as she offered no evidence of an adverse employment action taken against her, the focus is on the allegations that Cote added to her statement, i.e. about Dorn, in June and July of 2012, walking around in the area she worked. And the issue presented is whether, at summary judgment, Dorn's walking around Cote is "an act contributing to the claim," for purposes of applying *Farmland Foods,* when Cote admits she did not see Dorn do anything wrongful during those times.

Appellants argue that the "act" required must itself be conduct in furtherance of harassment. In the example given in *AMTRAK,* the United States Supreme Court said it must be an "act" that is "part of the hostile work environment." *AMTRAK* at 118. The clear import of cases, therefore, is that the act must itself be harassing conduct. Appellants maintain that when the 'act' itself is harmless, the evidence fails. Moreover, the act cannot be made harmful merely by supposition. Cote's suggesting Dorn was 'displaying himself' or trying to get her to look at his 'private parts' is merely conjecture. Nor may a legitimate inference be drawn by a fact finder from the act either. See *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001) (an inference is not legitimate if it is based on speculation or conjecture). A legitimate inference might be proved if, for example, Cote saw

Dorn walking toward her with his hand on his crotch, or he was maneuvering his zipper as he drew near her. But that is not the evidence.

The trial court recognized this, saying "[a]t trial Cote will have to prove Dorn was actually exposing himself during these months . . . ." [Ruling, p. 15; App. 190]. Moreover, it recognized Cote would have difficulty doing, so since Cote acknowledged she did not actually see Dorn expose himself to her. [Ruling, p. 15; App. 190]. Notwithstanding, the trial court failed to grant summary judgment to Appellants. The trial judge did not require Cote to provide proof of a hostile act by Dorn, or an act that objectively demonstrated his desire to make the work environment hostile for her. Instead, the trial court allowed Cote's belief, i.e. "Cote clearly states she *thought* Dorn was exposing himself in her presence during this timeframe," (emphasis added), based on a 'demeanor' she did not observe, to substitute as proof and avoid summary judgment. [Ruling, p. 15; App. 190].

Relying on subjective belief and conjecture to deny summary judgment is improper. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001). Dorn's being in the workplace near Cote, fully clothed, cannot be a hostile act, particularly since this area of the office was a location where everyone frequented to do work-related activities. Her claimed aversion to his presence, even to feeling 'tense' as Dorn walked nearby her, does not amount to a hostile act by Dorn. Dorn had no knowledge of her inner feelings at the time. Cote had never said to Dorn that his

presence nearby her was offensive or made her uncomfortable, at any time while they worked together at Agency.

Further, Cote's general description of what happened, that Dorn walked nearby and, sometimes, asked something of her [Cote Affidavit, ¶21, ex. A-1, p.6; App. 108, 116], does not contest the legitimate work-related purposes for why Dorn, and other agents in the office, would be in Cote's immediate vicinity. The evidence revealed that Cote sat behind a counter in a small space across from the reception area. Next to her were various office machines, such as the postage meter. The machine that copied, faxed and scanned paper was located there as well. The agency's cabinets, with all of the client files, were next to Cote. The office storage and telephone were there, too. It was not refuted that the Dorns, Ms. Strawn, and others were in the area where Cote sat dozens of times a day, at all times of the day, for a variety of reasons. For example, should one need to obtain a customer files, apply postage on outgoing mail, make copies, send a fax, get supplies, or take a customer payment, one had to be right next to Cote.

It also would be usual and customary to be asking questions of Cote. She admits she was the office manager. As such, she was involved in all aspects of the day-to-day business. Cote would have been accustomed to Dorn asking for something. And if Dorn did not need anything, his being silent around her was

perfectly normal, too. Or, perhaps, he saw her on the telephone and, believing her occupied, refrained from asking something.

Using summary judgment to pierce the allegations of one asserting sexual harassment is commonplace. As Edeal testified in his affidavit, Cote admitted in February of 2013, in the presence of Strawn and he, the harassing behaviors Cote accused Dorn of perpetrating against her had ceased with the March 12, 2012, incident mentioned in her memo. [Edeal Affidavit, ¶7, Strawn Affidavit, ¶7; App. 75, 77, 79]. If further harassing acts happened in June or July of 2012, Cote had time a plenty to add the details into the memo she says she kept on her home computer. Yet those allegations never surfaced until Cote went to the ICRC. No detail of any 'act' in those months, that can be said to be part of a hostile work environment rather than the ordinary work environment, whether in the memo to the ICRC or in the summary judgment affidavit, was provided. Moreover, no date, no day, no correlation to another event to give a context, was provided. Made more difficult in Cote's charge is the utter lack of details of what happened in the work area. Cote did not evidence what activities Dorn was engaged in when he was nearby. What he said on the occasions when he spoke aloud, Cote did not say either. In sum, Cote did not evidence that Dorn's presence around the working area, on any occasion in June or July of 2012, was pretextual, i.e. not for a business reason, but to sexually harass her.

The lack of objective evidence, of an 'act' in furtherance of harassing conduct in June or July of 2012, is critically important. Cote cannot satisfy her burden merely by having a belief that harassment was intended from an innocuous act of a co-worker. Nor does a conclusory statement, such as "[i]t was obvious from his demeanor that he was there to harass me" [Cote Affidavit, ¶21], satisfy that burden. If mere supposition by a claimant was all the proof needed, sexual harassment would be found in each and every case where it was alleged.

Summary judgment was appropriate on this claim because ongoing harassment within the 300 day window is unproven, and the statute of limitations had run in regard to any those other acts Cote accused Dorn of committing prior to April 8, 2012.

Finally, mention is made of the trial court's footnote, about the possibility for determining that "an employee is still subjected to a hostile work environment where the harassing condition ceases to exist but the employee still feels harassed by objectively innocuous acts." [Ruling, p. 15; App. 190]. This thinking, if pursued, would eviscerate the statute of limitations and would greatly expand liability for employers across Iowa. How an employer would know that objectively innocuous acts were fermenting an ongoing hostile work environment is one question. And allowing an employee such latitude would create room for much mischief. Just having a protagonist and an antagonist working together

would open a door for further allegations, and greater damages. Appellants respectfully say the law should not be changed to permit such a slippery slope argument.

b. The tort claims

Iowa Code § 614.1(2) sets the period of limitations for injuries to one's person, including tortious acts such as assault and intentional infliction of emotional distress. These claims must be filed in court within two years. Cote filed her original Petition on April 7, 2014 [Cote Petition, p. 1; App. 1] and then amended that petition [Amended Petition, p. 1; App. 20] to state two alternative tort claims. The trial court allowed the alternative claims to relate back to that date, pursuant to Iowa R. Civ. P. 1.402(5). [Ruling, p. 18; App. 193]. It held any tort claims that are based on acts preceding that date were barred by the two-year limitations period. [Ruling, p. 18; App. 193]. So the issue presented at summary judgment is whether Cote stated prima facie claims of assault or of intentional infliction of emotional distress against Appellants, when the only fact she adduced is that periodically during June or July of 2012, Dorn and she were present in the same work area at the same time.

i. *The assault claim.*

The law in Iowa provides that assault is a physical act. It also is an intentional act. The actor must intend the act to put another in fear of physical pain or injury, or intend the act to put another in fear of physical contact which a reasonable person would deem insulting or offensive; and the victim reasonably believes that the act may be carried out immediately. See *Greenland*, 500 N.W.2d at 38. These elements mirror IRC § 708.1(1), (2).

As noted earlier, the acts asserted by Cote in her affidavit are Dorn's walking in the work area and his sometimes asking Cote something. These bare essentials do not prove an assault occurred or could even be reasonably understood that one could occur. Moreover, the evidence Cote adduced showed Cote looked away from Dorn. She speculated that his intent was to achieve some additional harassing purpose; however, Cote did not see him do anything. Iowa has long said that at summary judgment, a party must "come forth with specific facts which constitute competent evidence showing a prima facie claim . . ." *Gruener v. Cedar Falls*, 189 N.W.2d 577, 580 (Iowa 1971). A party's conclusions or beliefs are "fatally deficient" under summary judgment standards. *Prior v. Rathjen*, 199 N.W.2d 327, 332 (Iowa 1972).

The trial court must have recognized this flaw in the evidentiary showing of Cote because, in the ruling it made, the court seized from other situations, which were outside the two-year limitations period and barred, allegations where Cote

claimed assaults happened, to justify its position that the motion should be overruled. The trial court said it is "possible that Dorn flashed Cote," [Ruling, p. 19; App. 194] in June or July because, essentially, Cote alleged in earlier years he did it.

That is a flawed analysis. First, Cote's assertions of prior bad acts, which are unsubstantiated allegations at this point, as opposed to crimes for which a conviction occurred, are not admissible to prove that Dorn acted in conformity therewith on any occasion in June or July of 2012. See, e.g. Iowa R. Evid. 404. *State v. Roth*, 403 N.W.2d 762, 765 (Iowa 1987) (evidence of other crimes will be excluded if relevant only to show an individual is a bad person capable of committing bad acts). Second, the trial court engaged in the same speculation and conjecture that Cote did in her affidavit. Saying something is "possible" is akin to "the old practice of letting every litigant have a trial on his pleadings, whether or not his resistance to the motion measures up to the exacting standards" of modern summary judgment practice. *Gruener* at 581. It was the responsibility of the trial court to look for prima facie proof of the claimed assault, which required an actual act, such as Dorn having exposing himself, be evidenced by Cote, rather than just her hunch or surmise, to survive summary judgment. Based on the evidence Cote adduced a reasonable jury cannot determine that, in June or July, such an act actually happened. As a matter of law, Cote's claim that Dorn assaulted her in

June or July of 2012 fails, and summary judgment should have been granted to Appellants.

ii. The intentional infliction of emotional distress claim.

A prima facie claim of intentional infliction of emotional distress was not evidenced by Cote's proof either. Among other things, *Smith v. Iowa State Univ. of Sci. & Tech.*, 851 N.W.2d 1, 26 (Iowa 2014) teaches that "[f]or a plaintiff to successfully bring a claim of intentional infliction of emotional distress, he or she must demonstrate four elements:

> "(1) outrageous conduct by the defendant; (2) the defendant intentionally caused, or recklessly disregarded the probability of causing, the emotional distress; (3) plaintiff suffered severe or extreme emotional distress; and (4) the defendant's outrageous conduct was the actual and proximate cause of the emotional distress,"

Citing *Barreca v. Nickolas*, 683 N.W.2d 111, 123-24 (Iowa 2004) (quoting *Fuller v. Local Union No. 106*, 567 N.W.2d 419, 423 (Iowa 1997)). The *Smith* decision acknowledged that a plaintiff must establish a prima facie case for outrageous conduct, and that the duty of a trial court, in the first instance, is to determine, as a matter of law, whether the conduct complained of may reasonably be regarded as outrageous.

This is the standard the trial court acknowledged. [Ruling, p. 19]. Yet the evidence the trial court considered, and relied upon to overrule the motion for summary judgment, was *not* what Cote said happened in June or July of 2012.

Rather, the trial court said things Cote claimed at times before April 8, 2012, meaning Cote's allegations of Dorn's "repeated showing of an erection, covered or uncovered, to a female coworker," or his 'standing near showing his erection - so near she accidently touched his penis with her hand', was 'outrageous conduct' sufficient to deny summary judgment to Appellants. [Ruling, p. 19; App. 194].

That was plain error by the trial court. What may or may not have happened on other occasions, whether to Cote or other female coworkers, as alleged by Cote, such would have occurred outside the statute of limitations for these torts. It is not competent evidence in support of Cote's claim that, during June or July of 2012, Dorn's outrageous conduct caused her emotional distress.

However described by Cote, whether in her ICRC statement or the summary judgment affidavit, Dorn's mere presence in the same work area as Cote during June or July, and his asking something of Cote on occasions, was not outrageous conduct. The trial court should have ruled, as a matter of law, that outrageous conduct was not evidenced and that, therefore, prima facie proof of the tort being claimed by Cote was lacking.

The trial court understood that Iowa requires tort claims to stand each on its own. [Ruling, p. 17; App. 192]. Where one has asserted that a tort was repeated, each claim alleged must have its own proof elements. The court in *Hegg v. Hawkeye Tri-City REC*, 512 N.W.2d 558, 559 (Iowa 1994) referred to these as

"separate and successive actions" by the claimant seeking damages. Even in circumstances where the statute of limitations intervened, the elements of the latter case must be proven although, if damages in the latter case overlap with the damages of an earlier claim that was barred, the burden of segregating such damages rests with the defendant. *Riniker v. Wilson*, 623 N.W.2d 220, 228 (Iowa Ct. App. 2000).

Thus, the trial court should not have allowed proof elements of claims the statute of limitations has barred to be the foundation of its analysis of the prima facie case of subsequent claims. If those claims are lacking in proof, the earlier claims cannot supply the missing elements.

VI. CONCLUSION

The Appellants respectfully request that this Honorable Court must reverse the ruling of the district court, find that the district court committed error, and must grant the Appellants' summary judgment motion.

Derby Insurance Agency, Inc.
and Kevin Dorn, Appellants

By: /s/Aaron F. Smeall

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VII. REQUEST FOR ORAL SUBMISSION

Appellants hereby request to submit this appeal with oral argument.

By: /s/Aaron F. Smeall
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VIII. CERTIFICATE OF COSTS

Pursuant to Iowa Rule of Appellate Procedure 6.903(2)(j) the undersigned attorney hereby certifies that the actual cost for producing the requisite copies of the foregoing document was $0.00.

By: /s/Aaron F. Smeall
Aaron F. Smeall, # AT007416

IX. CERTIFICATE OF SERVICE

Pursuant to Iowa Rule of Civil Procedure 6.701 and 6.901 the undersigned attorney hereby certifies that on this 6th day of September, 2016, this document was served upon all parties to this appeal by electronic filing via EDMS and by US Mail:

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By: /s/Aaron F. Smeall
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X. CERTIFICATE OF FILING

Pursuant to Iowa Rule of Civil Procedure 6.701 and 6.901 the undersigned attorney hereby certifies that on this 6th day of September, 2016, this document was filed with the Iowa Supreme Court by electronic filing via EDMS.

By: /s/Aaron F. Smeall
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XI. CERTIFICATE OF COMPLAINCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 10,607 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of issues, and certificates).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman, size 14 point font, in plain style except for case names and emphasis.

By: /s/Aaron F. Smeall
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September 6, 2016
Date